No. 83-770

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF NEW YORK, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the Department of Transportation correctly determined that promulgation of HM-164, which establishes national standards for the highway transportation of radioactive materials, would not significantly affect the environment within the meaning of the National Environmental Policy Act and that preparation of an Environmental Impact Statement therefore was not required.

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the federal respondents, moves that the appeal be dismissed or, in the alternative, that the judgment of the court of appeals be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-52a) is reported at 715 F.2d 732. The opinion of the district court (J.S. App. 57a-188a) is reported at 539 F. Supp. 1237.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1983 (J.S. App. 1a-2a). Notices of

appeal were filed on behalf of the City of New York and the State of New York on August 19 and 31, 1983, respectively (J.S. App. 189a-191a, 192a-194a). The jurisdictional statement was filed on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). We discuss the Court's jurisdiction at pages 9-11, *infra*.

STATUTES AND REGULATION INVOLVED

Relevant provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. (& Supp. V) 1801 *et seq.*, and Rule HM-164, 49 C.F.R. 177.825(b), are reproduced at App. 1a-3a, *infra*.

STATEMENT

1. This case involves the validity of national standards for highway transportation of radioactive materials—known as HM-164—promulgated by the Department of Transportation in 1981. Sections 104 and 105(a) of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 1803 and 1804(a), vest the Secretary of Transportation with authority to designate materials as "hazardous" and to regulate the transportation of materials so designated. Section 112(a) of the HMTA, 49 U.S.C. 1811(a), provides that any state or local regulation inconsistent with federal regulations is preempted. Pursuant to her authority under the HMTA, the Secretary has designated radioactive materials as hazardous (49 C.F.R. 172.101). Before promulgation of HM-164, the Department of Transportation had no regulations governing the routing of radioactive materials under the HMTA, although it regulated other safety aspects of nuclear materials transportation, such as packaging. See 49 C.F.R. 173.389 *et seq.*

In the absence of preemptive regulations under the HMTA, a growing number of state and local governments enacted regulations restricting the transportation of nuclear materials. These measures included complete prohibitions, permit fees, notification and escort requirements, and time of day restrictions. See 43 Fed. Reg. 36492 (1978). In 1976, appellant City of New York amended its health code to prohibit transportation of spent nuclear fuel and large quantities of nuclear material without a Certificate of Emergency Transport. Such a certificate could be issued only for the "most compelling reasons involving urgent public policy or national security interests * * *." N.Y. City Health Code § 175.111(*l*) (1977). See J.S. App. 63a-64a & n.1.[1]

Because of the various restrictions imposed by New York City and many other jurisdictions around the country, the Department of Transportation undertook a rulemaking to study the need for promulgation of uniform federal rules to govern highway transportation of nuclear materials. On August 17, 1978, the Department published an Advance Notice of Proposed Rulemaking, announcing its intention to consider the need for national routing rules for highway shipments of radioactive materials. 43 Fed. Reg. 36492. In 1980, the Department published a Notice of Proposed Rulemaking containing proposals for a national routing system and other safety requirements for such highway shipments. 45 Fed. Reg. 7140. See J.S. App. 5a-6a. New York City actively participated in the Department's rulemaking process. See *id.* at 9a-10a, 67a-68a, 71a-72a.

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[1] One effect of the City's ordinance was to cut off highway transit of spent nuclear fuel from Brookhaven National Laboratories, located on Long Island (J.S. App. 63a-65a).

Following eight public hearings and consideration of over 1,600 comments, the Department issued its Final Rule, HM-164. 46 Fed. Reg. 5298 (1981). The Department found that "public safety can be improved through a nationally uniform rule that ensures the use of available highway routes that are known to be safe for large quantity radioactive materials" and that "the impact of piecemeal State and local restrictions * * * signifies a need for nationally consistent routing rules." *Id.* at 5299. In general, HM-164 designates the interstate highway system as the required route for large quantity shipments of radioactive materials because of the low accident rate on that system and its capacity to reduce transit time. HM-164 also requires use of interstate bypasses or beltways, when available, to avoid urban areas. 49 C.F.R. 177.825(b). The Department recognized that local roads could provide safer alternatives in some cases and therefore provided for designation of alternate routes by state authorities in accordance with guidelines developed by the Department. 49 C.F.R. 177.825(b)(1)(ii). In an appendix to HM-164, the Department advised that local regulations would be inconsistent with HM-164 if they "prohibit[] transportation of large quantity radioactive materials by highway between any two points without providing an alternate route for the duration of the prohibition." 49 C.F.R. 177 App. A. The Department also provided in HM-164 for written route plans, driver training programs, and adherence to security procedures established by the NRC. 49 C.F.R. 173.22, 177.825(c), (d) and (e).

At the same time it promulgated HM-164, the Department issued a Final Regulatory Evaluation and Environmental Assessment, in which it concluded,

on the basis of extensive consideration of technical data, that HM-164 would not have a significant impact on the environment and that preparation of an Environmental Impact Statement (EIS) therefore was not required under the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C). In making this assessment, the Department relied principally on data from two reports—the Nuclear Regulatory Commission's *NUREG-0170, Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes* (1977) and *Transportation of Radionuclides in Urban Environs: Draft Environmental Assessment (SANDIA Report)* (1980). *NUREG-0170* addressed environmental effects of, and risks posed by, all modes of transportation of radioactive materials. It found that the radiological risk from normal highway transportation was quite low. Based on the *NUREG-0170* analysis, it appeared that HM-164 would actually reduce background radiation levels slightly. J.S. App. 24a-25a. *NUREG-0170* also found the radiological risk from accidents to be a very small percentage of normal transportation risk on an annual basis (J.S. App. 26a).[2] Examining a "worst case" scenario of a severe accident involving large quantities of highly toxic radioactive materials in a densely populated area, *NUREG-0170* found that, although the consequences could be severe, the probability of occurrence was extremely small[3] (J.S. App. 28a).

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[2] The analysis of technical data in *NUREG-0170* indicated that a transportation accident sufficiently serious to cause one or more early deaths from radiation would occur on the average only once every 1000 years (J.S. App. 27a).

[3] The NRC concluded that the probability of occurrence of a worst case accident was .000000003, or once every 300 million years (J.S. App. 9a, 28a).

The *SANDIA Report* was an exhaustive analysis of the risks of nuclear transportation in New York City. Like *NUREG-0170*, the *SANDIA Report* concluded that the risk from normal transportation and the risk of accidents were both quite small. Examining the worst conceivable accident (termed the "maximum credible accident"), the *SANDIA Report* concluded that, while the consequences would be severe, the probability of occurrence averaged .000000003 or less per year in New York City. J.S. App. 115a. The Department concluded on the basis of the technical data that although routing nuclear materials by highway around urban centers would reduce the consequences of the worst possible accident, the risk of occurrence would not necessarily decrease, and in fact might increase if, for example, poorer roads were used (J.S. App. 26a-27a). Based on the reports and on its own analysis of the data, the Department concluded that the risks of highway transport are so low that HM-164 would have no significant environmental impact.

2. In March 1981, New York City filed this action, challenging HM-164 on numerous grounds.[4] The City claimed, inter alia, that the Department's decision not to prepare an Environmental Impact Statement violated NEPA and that the HMTA required the Department to examine all alternative modes of transportation, including barging around densely

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[4] Following publication of HM-164 as a final rule in January 1981, the City requested a nonpreemption determination from the Department, pursuant to 49 U.S.C. 1811(b). In January 1982, the Department informed the City that it had failed to provide sufficient documentation for its request. J.S. App. 9a-10a, 83a-85a. The City has not yet supplied the necessary information to the Department.

populated areas such as New York City, and to choose transportation by the safest mode in each locality.[5]

On cross-motions for summary judgment, the district court held that the Department violated the HMTA and NEPA when it promulgated HM-164 (J.S. 57a-188a). The court found that the Department's assessment of low probability/high consequence accidents (*i.e.*, the "worst case scenario") was inadequate under NEPA (J.S. App. 106a-142a) and that the Department had failed to examine alternative modes of transportation, as the court believed NEPA required (J.S. App. 142a-170a). The court also concluded that the HMTA requires the Department to maximize public safety on national and local levels and to examine all alternative modes of transportation (J.S. App. 170a-183a). The district court enjoined the Department from enforcing HM-164 in a manner that would override the New York City ordinance or that would override bans on highway transportation of radioactive materials by any other state or locality that, upon application to the Department, demonstrated that such transportation would occur in densely populated areas and that potentially safer alternative modes of transportation existed (J.S. App. 54a-56a).

3. The court of appeals reversed (Oakes, J., dissenting) (J.S. App. 1a-52a). It concluded that the HMTA does not require the Secretary to maximize public safety to the exclusion of all other considerations. The court found that the reference to "ade-

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[5] Shortly after the complaint was filed, the State of New York, Sullivan County, and the Town of Brookhaven were granted leave to intervene as plaintiffs, and a number of power companies were permitted to intervene as defendants (J.S. App. 58a-59a).

quate" protection of the public in Section 102 of the HMTA, 49 U.S.C. 1801, and the provision for nonpreemption rulings for safer local restrictions in Section 112(b), 49 U.S.C. 1811(b), indicated that the Department was not required to maximize safety or to predicate rules of national application on consideration of local characteristics. In addition, the court of appeals concluded that in view of Congress's prior practice of regulating each mode of transportation independently, the HMTA did not require the Department to compare the relative safety of alternative modes or to mandate intermodal shifts. J.S. App. 11a-15a.

The court of appeals held further that the Department's action was consistent with NEPA. The court noted that the range of alternatives an agency must consider is logically defined by the mandate of the statute authorizing the agency's action (in this case the HMTA) and that when an agency has found that its action will have no significant impact on the environment, the range of alternatives it is required to consider under NEPA is narrower than in other cases. J.S. App. 16a-21a. The court concluded that since the HMTA did not contemplate that promulgation of a national system for regulating highway transportation would require consideration of other modes of transportation, such consideration was not required under NEPA. In the court's view, the Department's nonpreemption procedure provided the most appropriate forum for consideration of the barging alternative, which is by definition site-specific and therefore not a viable alternative to a nationwide regulation. J.S. App. 21a-23a.

Finally, the court of appeals held that the Department's environmental assessment was adequate and

that it had reasonably concluded on the basis of the evidence that HM-164 would not have a significant effect on the environment. The court found that the Department's method of risk analysis, including its "worst case" analysis, could not be characterized as arbitrary, capricious, or an abuse of discretion. It rejected appellants' contentions that the Department had not given adequate attention to a variety of matters, including the probability of occurrence of an accident, in its environmental assessment. J.S. App. 23a-39a.

ARGUMENT

Appellants contend that the Department of Transportation was required to prepare an Environmental Impact Statement in connection with promulgation of national standards for highway transportation of radioactive materials. They urge also that the HMTA and NEPA require the Department to evaluate alternative modes of transportation, in particular the alternative of barging radioactive materials around New York City. The court of appeals rejected these claims in a thorough and carefully reasoned opinion. It concluded that the Department had conducted a proper evaluation of the available evidence and that its determination that HM-164 would not "significantly" affect the environment could not be regarded as arbitrary, capricious, or an abuse of discretion. The court of appeals' decision is clearly correct and does not warrant further review.

1. We note, at the outset, that this case is not within this Court's appellate jurisdiction. Appellants rely on 28 U.S.C. 1254(2), which gives the Court jurisdiction over an "appeal by a party relying on a

State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States * * *." The court of appeals' holding, however, does not address the validity of New York City Health Code § 175.111(*l*) (1976); rather, appellants challenged, and the courts below ruled on, the validity of a federal regulation, HM-164. The case was remanded to the district court with instructions to "enter a judgment upholding HM-164" (J.S. App. 40a). The court of appeals was not asked to, and did not, decide whether HM-164 preempts the City's ordinance.

The federal regulation itself preempts inconsistent state and local law in the absence of a nonpreemption determination by the Secretary under 49 U.S.C. 1811 (b). But any such preemption would occur because of the operation of the HMTA (see 49 U.S.C. 1811 (a)) and the promulgation of the federal regulation, not because of the court of appeals' ruling in this case. Appellants do not even cite any judicial or administrative ruling that the New York City ordinance is inconsistent with, and therefore preempted by, HM-164.

This Court has stressed that statutes authorizing appeal to the Court are to be strictly construed. *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7; *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 5; *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). Because this is not a case "in which a state statute [has been] expressly struck down on constitutional grounds" (*Silkwood* v. *Kerr-McGee*

Corp., slip op. 7), it is not within the Court's Section 1254(2) appellate jurisdiction.[6]

2. If appellants' jurisdictional statement is considered a petition for a writ of certiorari (see 28 U.S.C. 2103), it should be denied. Appellants do not identify any conflict among the circuits. Nor do they raise questions of broad general significance. The issues that underlie the question appellants present relate to the adequacy of the Department's evaluation of highly technical data. The court of appeals reviewed the Department's analysis carefully and determined that the Department had adequately evaluated the evidence before it and that the conclusions it had reached on the basis of that review could not be said to be arbitrary or capricious. That holding does not warrant further review. Moreover, appellants remain free to raise their contention that radioactive materials should be barged around New York City in the appropriate forum by seeking a non-preemption determination from the Secretary, pursuant to 49 U.S.C. 1811(b).

3. Appellants contend primarily (J.S. 15-21) that the court of appeals erred in upholding the Department's conclusion that promulgation of HM-164 was

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[6] *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 246 n.1 (1982), and *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978), cited by appellants (J.S. 5), do not support jurisdiction under Section 1254(2) in this case. In *Tully*, the court of appeals had affirmed a district court holding that a New York tax statute was preempted by a federal price control statute. In *Malone*, the court of appeals held a Minnesota pension statute invalid on the ground that it was preempted by federal labor policy. Thus, in both *Tully* and *Malone* (unlike this case), the issue presented to, and decided by, the court of appeals was whether a state statute was preempted by federal law.

not a major federal action "significantly affecting" the quality of the human environment (42 U.S.C. 4332(2)(C)) and that preparation of an EIS therefore was not required under NEPA.[7] Failure to prepare an EIS, they assert, was arbitrary and capricious in light of the Department's alleged failure to address certain risks and the existence of unresolved conflicts in the data the Department relied on in its environmental assessment. In addition, appellants claim that the Department violated regulations of the Council on Environmental Quality (CEQ), which state that preparation of an EIS should be considered in connection with an action for which the effects are likely to be "highly controversial" or "highly uncertain or involve unique or unknown risks" (40 C.F.R. 1508.27(b)(4) and (5)).[8] Those contentions are without merit.

In *Baltimore Gas & Electric Co.* v. *NRDC*, No. 82-524 (June 6, 1983), slip op. 9-10, this Court reaffirmed the well established proposition that deference is due agency decisions under NEPA so long as the agency has fulfilled its procedural duties under the

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[7] Appellants appear to suggest in their question presented and at J.S. 15 that the Department's failure to prepare an EIS violated both NEPA and the HMTA. The latter statute does not address the obligation to file an EIS; thus, the Department's duties in this regard are defined solely by NEPA.

[8] Appellants also claim (J.S. 16-17, 19) that the Department's decision not to prepare an EIS is inconsistent with CEQ regulations because HM-164 overrode "State, or local law[s] or requirements imposed for the protection of the environment" (40 C.F.R. 1508.27(b)(10)). But the CEQ regulation refers to actions that "threaten[] a violation" of federal, state or local law or requirements. It is not at all clear that that provision applies to a federal regulation that may preempt state or local regulations.

statute and has taken a "hard look" at environmental consequences. See also *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-228 (1980); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976).[9] Indeed, in *Baltimore Gas* (slip op. 9, 16), this Court noted that the need for deference to agencies is especially compelling in the area of nuclear regulation, because policy questions and uncertainties about technical matters in this area are best resolved by Congress or the agencies within whose areas of expertise these matters fall.

The Department's decision to prepare an environmental assessment, but not an EIS, in connection with HM-164 was clearly reasonable. Indeed, as the court of appeals noted (J.S. App. 23a), even the district court stopped short of finding that the evidence showed a "significant" effect that would have required the Department to prepare an EIS; rather, the district court merely concluded the Department's environmental assessment was flawed.

The court of appeals properly concluded that the administrative record does not reveal any risk or unresolved conflict in the data that was not adequately addressed in the Department's environmental assess-

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[9] In view of this general policy of deference, the lower courts have not interpreted 40 C.F.R. 1508.27(b)(4) (which requires that agencies consider whether effects are likely to be "highly controversial" in deciding whether to prepare an EIS) to require an EIS whenever there is any opposition to an action or any disagreement among experts. Rather, this regulation suggests that an EIS should be prepared when "a *substantial* dispute exists as to the size, nature or effect of the major federal action." *Rucker* v. *Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (emphasis added). See also *Hanly* v. *Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972).

ment. Appellants assert (J.S. 17) that the effect of HM-164 is "significant" because the Department found the risk of a catastrophic accident to be "credible" (see 46 Fed. Reg. 5298, 5299 (1981)). But the Department's reference to a high consequence accident as "credible" does not mean that it expected such an accident to occur. Rather, credibility is a technical term used in risk analysis in connection with analysis of the effect of a "worst case" accident. Such an analysis involves positing a hypothetical accident at the outer limits of credibility, but not so physically impossible or absurd as to make the analysis meaningless. See J.S. App. 27a-28a.

In any event, risk analysis is not based solely on the effect of a "worst case" accident. The Department performed a risk assessment in which the worst credible consequences were analyzed in terms of, and discounted by, the probability of their occurrence—a methodology the district court did not challenge (J.S. App. 29a). Based on this analysis, the Department identified the probability of occurrence of a credible worst case accident as .000000003, or once in every 300 million years (*id.* at 9a, 27a-28a). The court of appeals properly characterized this risk as "infinitesimal" (*id.* at 28a).

Appellants contend that the Department overlooked significant data or failed to resolve certain conflicts in the data. The court of appeals correctly held that the record reveals no such lapses. Appellants refer to differing estimates of accident mortality and number of future shipments (J.S. 18, 19). But in each case the Department relied on estimates at the conservative, or high, end of the scale in making its determination (see J.S. App. 31a-32a, 36a-37a). Appellants also point to historical accident data that the Depart-

ment "conceded" to be unreliable (J.S. 19). Although the accuracy of that data was understood to be somewhat questionable because of its manner of collection, the Department did not rely on the data to determine the probability of an accident; rather, they were merely used as an historical check on accident estimates derived from other data. See J.S. App. 32a n.17.

Appellants suggest next (J.S. 18-19) that the Department's environmental assessment improperly failed to discuss certain studies that indicate that casks used to transport radioactive materials are not as safe as Department studies showed. Although the Department did not address every study on this subject, the studies on which it did rely exhaustively analyzed cask reliability, and the court of appeals found that they fully supported the Department's conclusions. See J.S. App. 32a-33a. Indeed, the district court concluded that the Department's cask assessment was not on its face arbitrary or capricious. See *id.* at 124a-125a. As the lower courts have properly concluded, it would be inappropriate to require an agency to address every possible utterance on a particular subject. See *Environmental Defense Fund, Inc.* v. *Hoffman*, 566 F.2d 1060, 1068 (8th Cir. 1977); *Fayetteville Area Chamber of Commerce* v. *Volpe*, 515 F.2d 1021, 1027-1028 (4th Cir.), cert. denied, 423 U.S. 912 (1975); *Life of the Land* v. *Brinegar*, 485 F.2d 460, 469, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974); *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275, 1281 (9th Cir. 1973).

Appellants contend finally (J.S. 20) that the Department failed to consider two factors—human error and sabotage—in determining the probability of an

accident. In fact, the reports used by the Department addressed the matter of human error extensively (J.S. App. 33a-34a). Because the possibility that such error would affect the safety of cask transportation was extremely low, the Department determined not to include this factor in its risk calculation, since it would not have had any statistical effect on the outcome of the calculation (*ibid.*). The Department did not address the effect of sabotage in its risk assessment. However, the Department's statutory mandate under the HMTA is to regulate the transportation of radioactive materials at acceptable levels of safety in light of risks inherent in normal transportation. Responsibility for, and experience in, the protection of radioactive materials against willful or malicious conduct rests with the Nuclear Regulatory Commission,[10] and an NRC rulemaking proceeding has addressed this subject (see 45 Fed. Reg. 37399, 37402 (1980)). Even if sabotage were considered by the Department in its risk calculation, this factor (like human error) would have no material effect on the outcome of the calculation, since it is recognized to be unquantifiable. See J.S. App. 34a-36a.

The court of appeals reviewed the Department's analysis of the technical data with considerable care. It concluded that the Department had "faced up" to the task of risk assessment (J.S. App. 26a), that it had taken the "hard look" required by NEPA, and that the evidence in the record supported the Department's determinations. Thus, the Department's decision that the risk of a catastrophic accident did not

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[10] See 42 U.S.C. 2201; Department of Transportation and Nuclear Regulatory Commission Memorandum of Understanding, 44 Fed. Reg. 38690 (1979); HM-164 Notice of Proposed Rulemaking, 45 Fed. Reg. 7140, 7144 (1980).

create a "significant" risk for the human environment did not constitute an abuse of discretion. J.S. App. 38a-39a. That conclusion is correct and does not warrant further review.

4. Appellants also contend (J.S. 21-28) that the Department erred in failing to evaluate alternative modes of transportation, particularly the barging of radioactive materials around New York City. That contention is without merit.

a. Appellants urge (J.S. 22-25) that the HMTA requires the Department to evaluate alternatives that may be safer than highway transportation. But that is not the statutory directive. Congress empowered the Department "to protect the Nation *adequately* against the risks" of hazardous materials transportation, 49 U.S.C. 1801 (emphasis added), and gave the Secretary the authority to adopt any safety regulations she "deems necessary or appropriate," 49 U.S.C. 1804(a). Moreover, the fact that Congress authorized the Department to waive the preemptive effect of its rules in cases in which local rules provide a greater safety margin (49 U.S.C. 1811(b)) shows that the Department need not maximize safety to the exclusion of other concerns when promulgating nationwide federal regulations. Thus, once the Department determined that HM-164 provides an "adequate" and "appropriate" level of public safety for highway transportation, it was not required under the HMTA to examine alternative modes of shipment.

Construction of the HMTA to require consideration of alternative modes of transportation would suggest a major departure from prior congressional practice. Until the creation of the Department of Transportation in 1966, different independent agencies regulated

different modes of transportation.[11] Although Congress consolidated these agencies as components of the Department in 1966 (49 U.S.C. 1651 *et seq.*), it did not give the Department itself substantive control over the various modes of transportation. In enacting the HMTA in 1975 Congress sought to address the problem of fragmented federal authority over the transportation of hazardous materials. See, *e.g.*, S. Rep. 93-1192, 93d Cong., 2d Sess. 1 (1974). But Congress did not even suggest that the HMTA constituted a departure from the historical practice of regulating safety separately for each mode of transportation or that it was intended to require the Department to make intermodal comparisons.[12] Had Congress intended to depart in such a significant way from the prior regulatory scheme by requiring maximization of safety through intermodal comparisons, it surely would have given some indication of such an

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[11] The Coast Guard regulated maritime transportation of hazardous materials, 46 U.S.C. 170 note; the Interstate Commerce Commission regulated rail and highway transport of hazardous materials, 18 U.S.C. 835 note (repealed 1980); and the Federal Aviation Agency regulated air carriage of hazardous materials, 49 U.S.C. 1421 note.

[12] The House committee stressed that the HMTA was merely a consolidation measure and was not meant to change existing regulatory structures:

> While the language of subsection (c) provides a relatively broad grant of authority the Committee expects that the regulatory program presently in place with respect to carriers and shippers will be continued and new regulations promulgated to cover manufacturers. The Committee does not intend by this section to change existing law in regard to the Secretary's authority over the routing of hazardous materials.

H.R. Rep. 93-1083, 93d Cong., 2d Sess. 20 (1974).

intent. See *Finnegan* v. *Leu*, 456 U.S. 431, 441 n.12 (1982).

Moreover, requiring the Department to compare alternative modes of transportation would make it virtually impossible to adopt nationally uniform rules under the HMTA. The availability of alternative modes and their relative safety in any locale depend on site-specific factors. Under appellants' construction of the statute, the Department would be required to make thousands of site-specific comparisons to determine which mode of transportation would be the safest in each particular locale—an exercise that would be inconsistent with the statutory purpose of promoting national uniformity in hazardous materials transportation safety regulation.[13] See S. Rep. 93-1192, *supra*, at 37.

b. Appellants further assert (J.S. 25-29) that the Department violated NEPA by failing to consider alternatives to highway transportation in connection with promulgation of HM-164, in particular the alternative of barging around New York City. That assertion lacks merit. As we have shown above, the Department properly concluded that it was not required to prepare an EIS in connection with HM-164, and the HMTA does not require the Department to make intermodal comparisons. Appellants do not challenge the court of appeals' conclusions that an agency may consider a narrower range of alterna-

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[13] Congress recognized that flexibility was necessary in order to resolve safety problems unique to specific locales; it therefore provided under 49 U.S.C. 1811(b) for waivers of the preemptive effects of a national rule where local restrictions provide equal or greater safety without burdening interstate commerce.

tives when no EIS is required (J.S. App. 20a-21a) and that the range of alternatives to be considered must be defined by the objectives and scope of the statute under which the agency is acting in a given case (*id.* at 18a-19a).

It is especially clear that NEPA does not require consideration of the unique and site-specific alternative proffered by appellants—barging around New York City. Consideration of alternative modes of transportation for each local site would make it impossible to promulgate a nationwide rule. This Court admonished in *Vermont Yankee* that "the concept of alternatives [under NEPA] must be bounded by some notion of feasibility" (435 U.S. at 551). In order to accommodate the sort of site-specific alternative proposed by appellants, the Department has established the individual nonpreemption adjudication procedure described above. See page 6 note 4, *supra*; page 11, *supra;* page 19 note 13, *supra.* As the court of appeals concluded (J.S. App. 22a), the availability of the non-preemption procedure removes any concern about the Department's failure to consider barging in connection with promulgation of the nationwide rule.[14]

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[14] Appellants fault the court of appeals for relying on the nonpreemption procedure, apparently claiming that barging is a nationwide alternative (J.S. 27). But the issue in this litigation has always been framed in terms of whether the Department should be required to consider barging around New York City (see J.S. App. 20a). In any event, even if barging were considered on a nationwide basis, it would still be an infeasible alternative to a national highway transportation program. Fully 26% of nuclear facilities have no direct access to navigable waters (see *id.* at 21a n.12), so that a generic barging alternative would be impossible.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. If the jurisdictional statement is treated as a petition for a writ of certiorari, the petition should be denied. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), provides for inclusion of a detailed statement on the environmental impact of the proposed action "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."

Section 102 of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 1801, provides:

> It is declared to be the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.

Section 105(a) of the HMTA, 49 U.S.C. 1804(a), provides:

> The Secretary may issue, in accordance with the provisions of section 553 of title 5 including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems nec-

essary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation of certain hazardous materials.

Section 112 of the HMTA, 49 U.S.C. 1811, provides in pertinent part:

(a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

(b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of requlations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or politi-

cal subdivision thereof continues to administer and enforce effectively such requirement.

Rule HM-164, 49 C.F.R. 177.825(b), provides in pertinent part:

> Unless otherwise permitted by this section, a carrier and any person who operates a motor vehicle containing a package of large quantity radioactive material as defined in § 173.389(b) of this subchapter shall ensure that the vehicle operates over preferred routes selected to reduce time in transit, except that an Interstate System bypass or beltway around a city shall be used when available.
>
> (1) A preferred route consists of—
>
> (i) An Interstate System highway for which an alternative route is not designated by a State routing agency as provided in this section, and
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> (ii) A State-designated route selected by a State routing agency (see § 171.8 of this subchapter) in accordance with the DOT "Guidelines for Selecting Preferred Highway Routes for Shipments of Large Quantity Radioactive Materials".

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